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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

\_\_\_\_\_  
CAPITOL RECORDS, INC.; CAROLINE )  
RECORDS, INC.; EMI CHRISTIAN MUSIC )  
GROUP INC.; PRIORITY RECORDS LLC; VIRGIN )  
RECORDS AMERICA, INC.; BEECHWOOD )  
MUSIC CORP.; COLGEMS-EMI MUSIC INC.; EMI )  
APRIL MUSIC INC.; EMI BLACKWOOD MUSIC; )  
EMI FULL KEEL MUSIC; EMI GOLDEN TORCH )  
MUSIC CORP.; EMI LONGITUDE MUSIC; EMI )  
VIRGIN MUSIC, INC.; EMI VIRGIN SONGS, INC., )  
EMI AL GALLICO MUSIC CORP., EMI ALGEE )  
MUSIC CORP., EMI FEIST CATALOG, INC., EMI )  
GOLD HORIZON CORP., EMI GROVE PARK )  
MUSIC, INC., EMI HASTINGS CATALOG, INC., )  
EMI MILLS MUSIC, INC., EMI MILLER )  
CATALOG, INC., EMI ROBBINS CATALOG, )  
INC., EMI U CATALOG, INC., EMI UNART )  
CATALOG, INC., JOBETE MUSIC CO., INC., )  
SCREEN GEMS-EMI MUSIC, INC., STONE )  
AGATE MUSIC, and STONE DIAMOND MUSIC, )

Plaintiffs,

v.

MP3TUNES, LLC, and MICHAEL ROBERTSON,

Defendants.  
\_\_\_\_\_

CIVIL ACTION NO. 07-Civ. 9931  
(WHP)  
ECF Case

**DECLARATION OF  
MICHAEL ROBERTSON**

I, MICHAEL ROBERTSON, hereby declare:

1. I am the Chief Executive Officer of MP3tunes, Inc. ("MP3tunes"), one of the defendants in this action. I respectfully submit this declaration in support of Defendants' Motion for Summary Judgment in the above-captioned action.

**MP3tunes' Services And Revenue Model**

2. MP3tunes operates two separate websites, MP3tunes.com, which offers Internet storage services, and Sideload.com, which offers Internet search services.

3. MP3tunes' only revenues, from either website, derive from the fees that it charges consumers for providing them with storage services "in the cloud" (*i.e.*, on MP3tunes' servers). MP3tunes.com offers a basic storage plan with two gigabytes of storage free of charge. The two-gigabyte storage limit for free accounts applies to files uploaded from users' local hard drives, but not to files sideloaded from the Internet, for which there is no limit. Those users who wish to upload more than two gigabytes may upgrade to premium accounts, which cost up to \$12.95 per month and offer users more storage space, as well as file back-up services.

4. Sideload.com search services are free of charge. Since the launch of the two websites, there have never been any advertisements on either MP3tunes.com or Sideload.com. Sideload.com benefits MP3tunes by allowing users to discover new music through free tracks that are being promoted on the Internet. Such users will then go out into the marketplace and purchase music which, in turn, can be stored in users' lockers at MP3tunes.com.

**MP3tunes' Policy For Copyright Infringement**

5. MP3tunes has implemented and employs a policy to prohibit infringing activity on its websites MP3tunes.com and Sideload.com. No Internet company can control how all of its users behave. MP3tunes is a small company, but it still has 700,000 users and millions of files on its system, and thus faces the same difficulties policing users as do other Internet sites.

Yet MP3tunes takes copyright and other intellectual property laws very seriously and expects its users to do the same. This fact is made clear to the users of MP3tunes' services.

6. To combat the potential for infringement at its websites, MP3tunes has, since its launch, required its users to agree to Terms and Conditions, a true and correct copy of which is attached hereto as Exhibit A, before storing music to their lockers. MP3tunes' Terms and Conditions clearly prohibit users from storing content that infringes the copyright of any third party: **"You agree that you will not upload music and content, and will not request that any music or content be uploaded to your account maintained on the Site, that infringes the copyright or other intellectual property rights of any third party."**

7. In addition to requiring its users to agree to its Terms and Conditions, MP3tunes reminds its users of its policy by placing a Terms and Conditions link on each and every page of MP3tunes.com and Sideload.com. Moreover, MP3tunes employees who respond to user queries remind users that MP3tunes does not tolerate infringement. Attached hereto as Exhibit B is a sampling of correspondence between MP3tunes and its users wherein MP3tunes instructs users that it prohibits infringement. Unlike file-sharing companies such as Usenet, LimeWire, and Grokster, MP3tunes neither instructs nor encourages, and has never instructed nor encouraged, any of its users to engage in copyright infringement.

8. To further combat copyright infringement, pursuant to the Digital Millennium Copyright Act ("DMCA") MP3tunes has registered an agent with the Copyright Office to receive notices from copyright owners of alleged infringement. On each and every page of its two websites, MP3tunes.com and Sideload.com, MP3tunes includes a link to its Terms and Conditions wherein MP3tunes encourages copyright owners to notify its designated DMCA agent of any suspected infringement hosted by MP3tunes. The contact information for MP3tunes' DMCA agent is not only accessible through MP3tunes' Terms and Conditions but

also through MP3tunes' "Frequently Asked Questions" page.

9. MP3tunes' effort to combat infringement is plainly manifest in its Policy:

Claims of Copyright Infringement. Claims of Copyright Infringement. MP3tunes respects the intellectual property of others, and we ask our users to do the same. The Digital Millennium Copyright Act of 1998 (the "DMCA") provides recourse for copyright owners who believe that material appearing on the Internet infringes their rights under U.S. copyright law. If you believe in good faith that materials hosted by MP3tunes infringe your copyright (for example, materials stored by MP3tunes for a subscriber or on one of our Forums), you (or your agent) may send us a notice requesting that the material be removed, or access to it blocked. The notice must include the following information: (a) a physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed; (b) identification of the copyrighted work claimed to have been infringed (or if multiple copyrighted works located on the Site are covered by a single notification, a representative list of such works); (c) identification of the material that is claimed to be infringing or the subject of infringing activity, and information reasonably sufficient to allow MP3tunes to locate the material on the Site; (d) the name, address, telephone number and email address (if available) of the complaining party; (e) a statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent or the law; and (f) a statement that the information in the notification is accurate and, under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed. If you believe in good faith that a notice of copyright infringement has been wrongly filed by MP3tunes against you, the DMCA permits you to send MP3tunes a counter-notice. Notices and counter-notices must meet the then-current statutory requirements imposed by the DMCA; see <http://www.loc.gov/copyright/> for details. Notices and counter-notices with respect to the Site should be sent to MP3tunes, Inc, 5960 Cornerstone Court, Suite 100, San Diego, CA 92121, Attn: Michael Robertson. We suggest that you consult your legal advisor before filing a notice or counter-notice. Also, be aware that there can be penalties for false claims under the DMCA.

Exhibit A.

10. When a copyright owner sends a take-down notice to MP3tunes' DMCA agent identifying the allegedly infringing material with information reasonably sufficient to allow

MP3tunes to locate the material on its website, MP3tunes expeditiously removes that material from its website. Attached hereto as Exhibit C are DMCA take-down notices that MP3tunes has received. In each instance, MP3tunes removed all the material identified therein. Consistent with this Policy, MP3tunes facilitates and never interferes with any standard technical measures used by copyright owners to identify or protect copyrighted works.

11. In addition, MP3tunes has implemented and informed its users of its Repeat Infringer Policy. This Policy is clearly set forth in its Terms and Conditions, to which users must agree prior to creating an account with MP3tunes. This Policy provides that: "Under the appropriate circumstances, it is MP3tunes' policy to remove and/or disable access from MP3tunes to web pages of repeat infringers, to terminate subscribers and account holders who are repeat infringers . . . ." See Ex. A. By requiring its users to submit a valid, working email, MP3tunes ensures that there is sufficient means for warning users of improper use of its services. MP3tunes has terminated the accounts of users whom it has suspected of using MP3tunes' services for the purposes of infringing activity. Attached hereto as Exhibit D is a chart listing user accounts that were terminated for such reasons.

**MP3tunes' Efforts, Beyond DMCA, To Prevent Copyright Infringement**

12. MP3tunes was conceived with the express intent to provide lawful services to music fans, and it complies with the DMCA. Indeed, MP3tunes goes above and beyond what is required by the DMCA to combat the potential for infringement at its websites, by prohibiting users from accessing lockers that they do not own by making each locker password-protected.

For example, MP3tunes' Terms and Conditions state:

You will be responsible for the confidentiality and use of your email address and password and you agree not to provide, disclose, transfer or resell your email address and password or use of or access to the Site to any third party. If you have reason to believe that your account with us is no longer secure, you must promptly

change your password by visiting <http://shop.mp3tunes.com/forgotPassword.php> and immediately notify us of the problem by contacting us at <http://www.mp3tunes.com/cb/contact/>. You are entirely responsible for maintaining the confidentiality of your email address and password and for any and all activities that ARE CONDUCTED through your account. (emphasis in the original)

Exhibit A.

13. Unlike LimeWire, Grokster or Napster, MP3tunes is not a music file sharing service. MP3tunes has never sought to attract former users of these file sharing services; not in its business plan nor in any marketing campaigns. Competitors' services like Microsoft's Skydrive and Apple's MobileMe iDisk services allow users to share music by freely accessing each other's lockers without any username or password required. By contrast, access to MP3tunes lockers always requires a username and password, and if MP3tunes discovers that more than one user is accessing a single locker, then it disables access to that locker and deletes its contents.

14. Beyond complying with the DMCA, MP3tunes also takes affirmative precautions to limit the potential for copyright infringement, by designing its system with access controls that limit the number of simultaneous log-ins to a locker account. For example, if a user chooses to publish his or her confidential log-in information, in violation of MP3tunes' express policy, and then tries to allow others to have access to his or her account, MP3tunes restricts this activity by limiting the number of log-ins that may access a user's account. This limit was originally set at 2, but has been extended to 10 to balance the needs of users who access their music locker from multiple devices and locations. Again, this contrasts with virtually all online storage services, which do not track simultaneous access and thus impose no limits.

15. Furthermore, MP3tunes combats the potential for infringing activity by blocking sideloading from third-party sites if MP3tunes becomes aware of infringing activity. MP3tunes

has blocked access to hundreds of such sites. Blocking an entire website prevents any links from that website from being sideloaded and blocks all URLs from that website from being added to Sideload.com. Attached hereto as Exhibit E is a list of blocked websites, most of which were blocked upon suspicion of file-sharing or other violations of MP3tunes' Terms and Conditions. Although EMI attempts to portray MP3tunes as unlawful, just the opposite is true. I am proud to state that, from the very outset, our service has had significantly greater restrictions and tighter security than other cloud storage services available on the Internet.

**MP3tunes' Response To Take-Down Notices In This Case**

16. On or around September 4, 2007, MP3tunes received a cease and desist letter from "EMI Music Group North America" with an enclosed CD-ROM containing a spreadsheet listing approximately 350 song titles, with artist names and URLs for websites that EMI claimed infringed its copyrights. Attached hereto as Exhibit F is a true and correct copy of that letter. Many of the URLs listed in the September 4, 2007 letter clearly were not infringing, as they were links to the Internet sites of well-known, reputable music magazines such as *Filter*, *Spin*, and *Paste Store*. Nevertheless, relying upon EMI's notice, MP3tunes promptly removed from its website all of the links to the URLs listed in the September 4, 2007 letter.

17. In addition to the approximately 350 song titles referenced in its letter, EMI Music Group North America contended that MP3tunes was "obligated to remove all of EMI's copyrighted works, even those not specifically identified on the attached" (emphasis in the original) and provided an Internet link for MP3tunes to consult in order to determine just which songs EMI Music Group North America was referencing. However, EMI Music Group North America provided no means of determining which specific songs were in question and where links to these songs could be located. Thus, in a responding letter dated September 13, 2007, MP3tunes offered to remove any other infringing links if "EMI" would merely identify them.



Attached hereto as Exhibit G is true and correct copy of MP3tunes letter dated September 13, 2007. In a follow-up letter dated September 18, 2007, EMI Music Group North America refused to MP3tunes' offer, claiming that its merely representative list somehow shifted the burden to MP3tunes to determine which of the works linked to from Sideload.com belonged to EMI Music Group North America. Attached hereto as Exhibit H is true and correct copy of that September 18, 2007 letter. While it was plainly not possible for MP3tunes to comply with EMI's request, MP3tunes continued trying to work out a resolution with EMI.

18. Thereafter, on or around October 25, 2007, MP3tunes received two further cease and desist letters, one from "EMI Music Group North America" and the other letter from "EMI Entertainment World." Attached hereto as Exhibits I and J are true and correct copies of the letters from EMI Music Group North America and EMI Entertainment World, respectively. In these letters, "EMI Music Group North America" and "EMI Entertainment World" maintained the position that MP3tunes was obligated to remove not only the songs identified in their take-down notices but also all other "EMI" songs, which could only be identified by conducting an investigation of EMI's websites. MP3tunes disabled access to all of the links identified in both letters, and further proposed that it would remove any other "EMI" songs if "EMI" provided information reasonably sufficient to permit MP3tunes to locate the material.

19. Notwithstanding MP3tunes' offer, Plaintiffs sued MP3tunes, and me personally, alleging that all EMI songs found on the Internet are infringing, and that the DMCA obligates MP3tunes to constantly search for such links and instantly remove them all, without EMI ever identifying the links. This is impossible.

20. Indeed, MP3tunes knows that all EMI songs on the Internet are not infringing. EMI makes extensive use of the Internet to distribute free music. It has long been known in the Internet sector that the major record labels make extensive use of free promotional MP3s as a



marketing and sales tool for both new and established artists. It has been my experience that EMI is probably one of the most aggressive labels in this regard. EMI distributes files from its own record label sites, from a wide range of music-related websites, and (because the demand is so high) through content delivery networks, or CDNs, like Akamai, which EMI pays to circulate music files on its behalf. Akamai is perhaps the biggest and most prominent CDN, which uses the brand “edgeboss” to market its technology service. MP3tunes has discovered on the Internet many EMI-copyrighted songs available for download with Akamai URLs.

21. Record company distribution of free MP3 downloads to promote both new and established artists has been a practice for as long as I have been involved in the Internet. To cite one well-known example, a few years ago EMI gave away an MP3 for the song “I Kissed A Girl” by then-unknown Capitol Records recording artist Katy Perry, which helped propel that song to #1 on both iTunes and Billboard charts. Katy Perry today is one of the world’s best-selling recording artists. Yet her song “U R So Gay” remains one of the thousands of songs that Plaintiffs are suing MP3tunes for linking to on its Sideload.com web site, when everyone else in the world is free to download the song and listen to it as often as they please from the following URL: [http://capi001.edgeboss.net/download/capi001/katyperry/audio/katyperry\\_usogay.mp3](http://capi001.edgeboss.net/download/capi001/katyperry/audio/katyperry_usogay.mp3). In this URL, “edgeboss.net” is the domain name – the brand name for Akamai, a CDN that EMI pays to distribute its music, for free, over the Internet. Just before that, “capi001” reflects that EMI’s Capital Records has an account with Akamai for music distribution.

22. This is just one example of EMI’s marketing practices. MP3tunes has found numerous additional examples of Plaintiffs making music files available for free download on the Internet. In fact, one EMI subsidiary actually maintains an entire music blog website (<http://www.theinsoundfromwayout.com/downloads/>), the principal purpose of which appears to be to distribute free downloads of EMI music files for promotional purposes.

23. Putting aside the issue of what Plaintiffs deliberately put on the Internet, it is not at all possible for MP3tunes to determine the songs for which Plaintiffs own copyrights. Most of the information is not publicly available, as the original copyright certificates change hands with every record company merger and acquisition. Indeed, when I asked to examine the corporate records Plaintiffs produced in this case which supposedly established their copyright ownership, Plaintiffs refused me access on supposed "confidentiality" grounds.

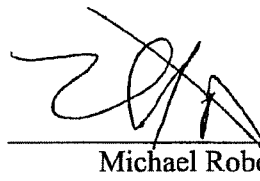
24. That is not to say that there are no infringing sites on the Internet. To the extent that EMI identifies such links, MP3tunes has always removed them, and will continue to do so. But for EMI to claim copyright infringement against MP3tunes, and me personally, simply for not removing all links to all "EMI" songs, without identifying the links, is unjust, impossible to comply with, and completely contrary to my understanding of the DMCA.

**Defendants' Lack Of Knowledge Of Alleged Infringement**

25. Lastly, I have reviewed the two song lists produced by Plaintiffs on June 19, 2009 and June 22, 2009, which list the purportedly copyrighted works that Plaintiffs allege have been infringed as a result of MP3tunes' services. However, prior to reviewing these two lists, neither I nor, to the best of my knowledge, anyone else at MP3tunes had any knowledge that these were unauthorized downloads, nor even that these works in fact belonged to Plaintiffs. In fact, other than Plaintiffs' mere allegation in this case, MP3tunes and I still have no knowledge that any of the songs on these lists represent copyright infringement by anyone.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: October 29, 2010  
San Diego, California

  
\_\_\_\_\_  
Michael Robertson